Supreme Court, U.S.
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No. 03-13

IN THE

United States Supreme Court

REPUBLIC OF AUSTRIA ET AL.,

Petitioner,

v.

MARIA V. ALTMANN,

Respondent.

On Appeal from the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The *Amicus* is the United Mexican States ("Mexico"). As a friendly foreign sovereign with extensive diplomatic, political, economic and social relations with the United States, Mexico has a significant interest in the United States' law governing foreign sovereign immunity. Indeed, because of the long history of cooperation between our two nations, Mexico is particularly affected by any change of what had been a bedrock principle of foreign sovereign immunity law before the Ninth Circuit issued *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *op. amended*, 327 F.3d 1246 (9th Cir. 2003)—that the exceptions to foreign sovereign immunity set forth in the Foreign Sovereign Immunities Act of 1976 ("FSIA") do not apply retroactively to conduct that occurred before the United States adopted the "restrictive theory" of sovereign immunity in 1952.

Mexico's interest in the proper resolution of this case is not theoretical. Mexico has been sued in recent years in the United States for alleged conduct that occurred entirely prior to 1952. *See Cruz v. United States of Am.*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002) ("*Cruz I*") (dismissing claims against Mexico and Mexican state instrumentalities by Mexican nationals who worked as migrant laborers in the United States during World War II under international agreements between Mexico and the United States, on grounds of absolute foreign sovereign immunity). Indeed, after the *Altmann* decision, Mexico was forced to relitigate the issue of its immunity for pre-1952 events under the amorphous retroactivity standard that the Ninth Circuit adopted. *See Cruz v. United States of Am.*, Nos. C 02-1942-CRB, C 02-1943-CRB, C 02-1944-CRB, C 01-

00892-CRB, 2003 U.S. Dist. LEXIS 10948 at *10-11 (N.D. Cal. June 20, 2003) ("*Cruz II*") (finding that, even under the *Altmann* standard, Mexico was entitled to absolute immunity). Other sovereigns are likewise still facing such suits. *See, e.g., Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003).[1]

SUMMARY OF ARGUMENT

Altmann erred in applying the restrictive theory of sovereign immunity embodied in the FSIA retroactively to conduct that occurred before the United States adopted that theory in 1952. To be sure, *Altmann* did not embrace wholesale retroactivity. *Altmann*, 317 F.3d at 962-67. But it instead adopted an amorphous, subjective and inherently uncertain totality-of-the-circumstances standard that would afford immunity to pre-1952 acts, except where the foreign state could not have "reasonably expect[ed]" such immunity at the time of those acts. *Id.* at 965. In doing so, it abandoned settled sovereign immunity law and replaced it with an uncertain, difficult to apply standard that exposes foreign states to the possibility of suit (and at a minimum, complicated motion practice) in the United States over events that by definition are more than half a century old.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. No party to this action or their counsel authored this brief, in part or in whole. No person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission. In submitting this *amicus* brief, Mexico of course does not waive its immunities under United States or international law, including the FSIA.

The Ninth Circuit decision set no limits and identified no priorities among the sorts of facts that could be considered in the application of its "reasonably expected" standard. Rather, it considered various decades-old events, academic articles, international legal pronouncements, U.S. State Department press releases, and legal treatises discussing Austrian law, all in the dubious exercise of trying to recreate the expectations of long-dead Austrian officials half a century earlier. Other courts trying to apply *Altmann* have perforce engaged in the same fact-intensive analysis. *See Joo*, 332 F.3d at 679 (engaging in extensive factual analysis applying *Altmann* to case involving Japan); *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *3 (same, in case involving Mexico).

This exercise invites uncertainty and is calculated to lead to unpredictable, if not idiosyncratic results. While states like Mexico clearly had a "reasonable expectation" of immunity from suit in the United States before 1952, *see Slade v. United States of Mexico*, 617 F. Supp. 351, 358 (D.D.C. 1985), *aff'd*, 790 F.2d 163 (D.C. Cir. 1986); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), retroactivity analysis should not turn on historical reconstruction of the understandings of particular foreign states in particular fact patterns. The Court should therefore follow its established rule that new statutes are presumed not to apply retroactively to impair substantive rights, reverse *Altmann* and reaffirm the previously well-settled law of immunity for foreign states from *in personam* suit in the United States without their consent for pre-1952 events.

To the extent the Court does not do this, it should at least reject the amorphous retroactivity analysis of *Altmann* in favor of a clear and more easily applicable standard: that foreign sovereigns are presumptively afforded absolute immunity for their pre-1952 acts, which presumption can be overcome only if the plaintiff shows that at the time of those acts, the United States Executive Branch had clearly and publicly announced it would not support immunity for them. A test looking exclusively to the contemporary, published statements of the Executive Branch with respect to immunity for the conduct at issue would be consistent with pre-1952 practice, because the courts before 1952 uniformly deferred to the Executive Branch's recommendations with regard to foreign sovereign immunity. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Moreover, because the State Department's published statements regarding immunity determination are easily ascertainable, this standard would restore at least a degree of the certainty that *Altmann* disrupted in this area of the foreign relations law of the United States.

Certainly, the Court should go no farther than *Altmann*, and should not apply the FSIA generally to pre-1952 conduct. *Altmann* retroactively applied the FSIA only in the unique circumstances of that case, which involves the alleged theft of Jewish-owned art by Nazi-controlled Austria during the Holocaust era. Even *Altmann*'s "reasonable expectation" standard did not question that as a general matter—absent these extraordinary facts—the FSIA does not apply to pre-1952 conduct. *Altmann* could not have plausibly suggested otherwise, as the overwhelming authority from this Court and elsewhere demonstrates that friendly foreign sovereigns would have reasonably expect-

ed to be afforded immunity before 1952. It would turn the presumption of non-retroactivity on its head if the Court were to retreat from this general rule. At most, *Altmann* should remain an isolated exception to the non-retroactivity of the FSIA.

ARGUMENT

POINT I

THE COURT SHOULD REVERSE *ALTMANN* AND REAFFIRM THAT THE FSIA DOES NOT RETROACTIVELY APPLY TO PRE-1952 CONDUCT

Altmann's application of the restrictive theory of sovereign immunity embodied in the FSIA to conduct that occurred before the United States adopted that theory should be rejected.

Prior to the adoption of the "restrictive" theory of sovereign immunity by the "Tate letter" of 1952, foreign sovereigns were generally afforded immunity from suit in the courts of the United States. *See, e.g., Verlinden*, 461 U.S. at 486 (noting that the State Department generally requested and the courts "generally granted foreign sovereigns complete immunity from suit" before the 1952 Tate Letter); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976) ("in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity"); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (holding that the Court has no jurisdiction over Peru unless Peru waived its immunity); *Oliver Am. Trading Co. v. United States of Mexico*, 264 U.S. 440, 442 (1924) ("Mexico was entitled to

immunity from suit in the Courts of the United States of America, unless upon its own consent . . . .”). Indeed, as the Court in *Verlinden* explained, these pre-1952 cases “came to be regarded as extending virtually absolute immunity to foreign sovereigns.” *Verlinden*, 461 U.S. at 486.

Foreign states dealing with the United States before 1952, as Mexico did when it entered into the wartime international agreements with the United States that gave rise to the claims against it in *Cruz*, justifiably relied on this jurisprudence. Certainly, Mexico would have been reluctant to make these agreements with the United States, which were of major importance to the United States war effort, *Cruz I*, 219 F. Supp. 2d at 1031, if it had been aware that to do so would expose it to suit in the United States as a result of a subsequent change in United States law. It is the function of the doctrine of non-retroactivity to protect against such after-the-fact deprivation of a party’s rights.

The courts have therefore refused to apply the FSIA, which codified the restrictive theory of immunity, to pre-1952 events. *Jackson*, 794 F.2d at 1497-98 (application of the FSIA to pre-1952 events “would interfere with antecedent rights of other sovereigns”); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323 (S.D.N.Y. 1987), *aff’d*, 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988). As the court held in *Slade*, 617 F. Supp. at 358, applying the FSIA retroactively would “clearly prejudice the antecedent rights of Mexico” [because] between 1922 and 1951, the government of Mexico could safely assume that the then existing doctrine of absolute immunity governed . . . .”

As the Eleventh Circuit in *Jackson* explained, fairness and principles of non-retroactivity demand that courts continue to respect the settled expectations of immunity of foreign sovereigns before 1952:

> [T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 [at the time of the alleged conduct in *Jackson*] by the enactment of a statute nearly three quarters of a century later.

Jackson, 794 F.2d at 1497-98. Indeed, this Court has repeatedly reaffirmed that the presumption against retroactive legislation is “deeply rooted in our jurisprudence.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997).

In the face of this authority—defying presumptions in favor of sovereign immunity, *see Verlinden*, 461 U.S. at 493, and non-retroactivity, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)—*Altmann* applied the FSIA’s expropriation exception to alleged conduct by Austria pre-dating 1952. *Altmann* thus stripped a foreign state of a defense to suit for conduct that was not subject to suit at the time it occurred. That altered Austria’s antecedent rights. *See Hughes Aircraft*, 520 U.S. at 951 (“The 1986 amendment [of the False Claims Act] does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the sub-

stantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other.").

The Ninth Circuit's holding cannot be squared with *Hughes Aircraft*. The Tate Letter effectively altered the United States law of sovereign immunity and therefore the *substantive* rights of affected parties.[2] Under the Court's retroactivity doctrine, the FSIA's codification of the Tate Letter cannot be applied retroactively to conduct that predated this change in law.

[2] Because Congress did not legislate with respect to foreign sovereign immunities issues until the FSIA in 1976, the law of sovereign immunity up to that time was what was declared by the federal courts. The courts in turn, having recognized at an early date the principle of absolute immunity, *see Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L. Ed. 287 (1812) (Marshall, C. J.), followed the lead of the Executive Branch, which routinely requested immunity in *in personam* suits against friendly foreign states until the announcement of the change in the Executive Branch's policy in 1952. The Executive Branch's policy and the courts' application of it (which included interpreting the doctrine of absolute immunity in cases where the Executive Branch did not file a suggestion of immunity) constituted the pre-1952 "common law" of foreign sovereign immunity.

POINT II

ANY EXCEPTION TO NON-RETROACTIVITY OF THE FSIA FOR PRE-1952 EVENTS SHOULD BE LIMITED TO SITUATIONS WHERE THE EXECUTIVE BRANCH, AT THE TIME, PUBLICLY DECLARED THAT IMMUNITY SHOULD NOT BE AFFORDED

If the Court were to sanction some exception to non-retroactivity, it should at least adopt a more practicable rule. *Altmann*'s focus on whether Austria in the 1940s had a "reasonable expectation" of immunity on the particular facts of that case is vague, subjective, and difficult to apply. Indeed, as the cases following *Altmann* demonstrate, this standard leads to highly fact-intensive litigation—the practicability of which depends on the quality of the historical record—as the parties and the court attempt to recreate what the foreign state might have reasonably expected many years ago. *Joo*, 332 F.3d at 683-84; *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *11.

An approach that is much more certain, is easily applied and would comport with pre-1952 practice would be to afford immunity to foreign states for pre-1952 conduct unless the plaintiff can show that the U.S. Executive Branch, at the time of the specific conduct at issue, had expressly and publicly announced it would not support sovereign immunity for the state that engaged in it. This rarely, if ever, occurred, precisely because it was the policy of the United States to afford absolute immunity to friendly foreign states.

This rule would zero in on the key factor in pre-Tate Letter practice, because the courts uniformly deferred to the Executive Branch before 1952 on questions of sovereign immunity. *Verlinden*, 461 U.S. at 486 (finding that the courts before 1952 generally deferred "to the decisions of the political branches-in particular, those of the Executive Branch-on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."); *Ex Parte Republic of Peru*, 318 U.S. at 586-87 ("The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."); *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (Noting that it is the duty of the courts to uphold a foreign state's claim of immunity "if the claim is recognized and allowed by the Executive Branch of the government . . . ."); *United States v. Lee*, 106 U.S. 196, 209 (1882) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."). This rule would also be practicable, because whether the Executive Branch published a clear statement that immunity should be denied to particular conduct by a particular foreign state is easily ascertainable.

POINT III

AT MOST, THE COURT SHOULD TREAT *ALTMANN* AS A LIMITED EXCEPTION TO NON-RETROACTIVITY

If the Court were to uphold *Altmann* in any way, Mexico respectfully urges the Court to recognize the expressly limited nature of that decision and leave intact the general rule that friendly sovereigns are entitled to immunity for their pre-1952 acts.

Altmann was a limited, fact-specific ruling. The Ninth Circuit specifically refrained from considering whether the FSIA generally applies retroactively. *Altmann*, 317 F.3d at 962. Rather, all that the court considered in *Altmann* was whether the Republic of Austria was entitled to immunity in light of the egregious allegations in that case, i.e., "its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life" during the Nazi period. *Id.* at 964. The Ninth Circuit found that Austria could not have legitimately expected to be afforded immunity in these circumstances and that applying restrictive immunity to such conduct for which the sovereign never reasonably expected to be afforded immunity "infringes on no right held at the time the acts at issue occurred." *Id.* at 966. The court's findings in this regard could not have been more fact-specific:

1. The critical consideration for the court was the "international takings violation at issue." *Id.* at 967. As the court explained:

> Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

Id. at 965.[3] The court took pains to distinguish this conduct from the sort of "economic transactions" that formed the basis of *Carl Marks*, *Slade*, and other cases that refused to apply the FSIA retroactively to pre-1952 conduct. *Id.* at 967.

2. The Ninth Circuit also found that the alleged conduct in Altmann was perpetrated by and in support of the actions of a wartime enemy of the United States. *Id.* at 964. Indeed, the court concluded that Austria could not reasonably have expected immunity for acts taken in concert with the Nazis or otherwise "closely associated with the atrocities of the War." *Id.* at 965. And the court cited U.S. State Department press releases suggesting that it was "this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution . . . [and to] relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 965.

3. Moreover, the Ninth Circuit considered that "[a]t the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted

[3] Mexico takes no position on whether the Ninth Circuit's assessment in this or other regards was legally or factually correct, but simply details the specific considerations relied on by the court to demonstrate the narrowness of the ruling.

the restrictive concept." *Id.* at 966 (citing Joseph M. Sweeney, *The International Law of Sovereign Immunity* 30 (U.S. Department of State Policy Research Study, 1963)).

Only based on all these specific findings and others did the Ninth Circuit conclude that "Austria could have had no reasonable expectation of immunity in a foreign court" and that the court's newly created exception to non-retroactivity applied. *Id.* The court expressly disclaimed any broader ruling outside the limited facts of this case and retreated from the district court's original ruling that the FSIA generally applies to pre-1952 conduct. *Id.* ("We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter.").

Even if this Court were to affirm this narrow decision—and sanction the Ninth Circuit's amorphous "reasonable expectation" standard—there is no basis to expand the decision to deprive sovereigns generally of immunity for pre-1952 acts. Indeed, far from alleged crimes by a wartime enemy, the overwhelming majority of cases implicating the non-retroactivity of the FSIA have involved either commercial, *e.g.*, *Jackson*, 794 F.2d at 1497-98 (suit against Chinese Government for payment of defaulted bearer bonds); *Carl Marks*, 665 F. Supp. at 323 (lawsuit to recover alleged interest owed on bonds); *Slade*, 617 F. Supp. at 358 (suit against Mexico to recover interest allegedly owed on certain receipts), or normal governmental pre-1952 activities of *friendly* nations. *Cruz I*, 219 F. Supp. 2d at 1031 (involving claims by Mexicans against Mexico for wage deductions payable in Mexico, under a government migrant labor program created by World War II interna-

tional agreements between Mexico and the United States, the purpose of which was to support the United States' war effort by temporarily supplying needed farming labor in the United States).

The concerns discussed by the Ninth Circuit in *Altmann* have no bearing on these thankfully more common sorts of cases. Certainly, these cases raise no "international takings" issue. And they implicate no conduct by a wartime enemy of the United States, much less conduct that was allegedly part of the crimes of the Nazi regime. The sovereigns in these cases and others simply had no reason to doubt at the time of their alleged conduct that the United States' "century and a half"-old policy of "complete immunity," *Verlinden*, 461 U.S. at 486, would be afforded to them if they were sued in the United States. Indeed, *Altmann* itself acknowledges that *friendly* sovereigns were traditionally entitled to absolute immunity. *See Altmann*, 317 F.3d at 962. Thus, *Altmann*, if not reversed outright, should be limited to the extraordinary circumstances that gave rise to it. In all other respects, the Court should reaffirm the non-retroactive application of the FSIA.

CONCLUSION

For the foregoing reasons and those expressed in Austria's brief, Mexico respectfully submits that the Court should answer the question accepted for review in the negative, and reverse *Altmann*. Alternatively, Mexico urges the Court to issue a ruling consistent with the points expressed above.

Respectfully submitted,

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November 14, 2003

Appendix 8

The Honorable
Irving M. Ives,
United States Senate

Appendix 9 — *Memorandum of Conversation, May 19, 1958, reprinted in For. Rel. 1958-1960*, (1993), IX, 769-70

MEMORANDUM OF CONVERSATION

DATE: May 19, 1958

SUBJECT: Article 26 Claims

PARTICIPANTS:

Austria

His Excellency, Julius Haab, Chancellor of Austria
His Excellency, Dr. Wilfried Platzer, Ambassador of Austria
The Honorable Dr. Friedrich Meznik, Chief of the Press Bureau, Austrian Federal Chancellery
Dr. Paul Zedtwitz, Counselor, Embassy of Austria
Dr. Erich Haider, Special Assistant to the Chancellor

United States

The Secretary
Mr. H. G. Torbert, Jr., Director, Western Europe
Mr. R. D. Kearney, Assistant Legal Adviser, European Affairs
Mr. F. L. Chapin, Austrian Desk

Chancellor Raab said that the Austrian Government had already agreed to pay 550 million schillings or approximately $21 million, for the Jewish Aid Fund which had been set up several years ago. Then the Jewish groups had made

additional claims based on Article 26. He had agreed to see the Jewish leaders on May 20 and would see what could be done about settling the claims. There had to be some end, however, to the claims.

The Secretary said that the United States had proposed a formula for settlement of the claims which would result in the payment of approximately $5 million or less than $200 each for the 30,000 claimants around the world. He scarcely needed to recall to the Chancellor the large measure of sympathy in the United States for the claimants. He believed it would be an advantage to Austria to settle the matter; he was glad that the Chancellor was meeting with a delegation of Jewish leaders; and he hped that the Chancellor would be able to give them some satisfaction.

Chancellor Raab

Chancellor Raab inquired about the $5 million figure and was informed that it represented the United States estimate of the total of all categories of claims. If the negotiations now in progress between the two governments resulted in a satisfactory settlement, the United States would be prepared to deliver a formal note stating that the United States would no longer intervene diplomatically on behalf of claimants under Article 26. Chancellor Raab broke in to say that Austria was ready to settle the claims under Article 26 and reiterated there must be an end to the Jewish claims. The Secretary pointed out that the settlement would eliminate further representation by the United States Government, but the Government could not prevent private persons from

advancing claims or arguing with the Austrian Government. The important thing would be that the United States would not support any such action after a satisfactory settlement was reached.

Chancellor Raab said that he would be glad to look into the negotiations and see what could be done about them. Austria was drafting war damage compensation laws, and the Jewish emigrants would be treated in the same manner as Austrian nationals in Austria with regard to any such compensation.

Appendix 10 — Memorandum from Ely Mauer to Mr. Nager, Nov. 28, 1960; ACT OF STATE, Record Group 59/ 250/67/03/07; National Archives, Silver Spring, Maryland

To: L – Mr. Hager

From: L/E – Ely Maurer

Subject: Background to Department Issuance of the "Bernstein Letter".

You have asked that I furnish you with a memorandum setting out the background of the Department's issuance of the so-called "Bernstein letter". This was the letter of April 13, 1949 from Mr. Tate, Acting Legal Adviser, to Bennet, House & Courts, attorneys for Bernstein in the case of *Bernstein v. N.V. Nederlandsche-Amerikaanach, etc.* (Holland-America Line), then pending in the New York federal courts. The letter is attached (Tab A).

The background is best set forth in narrative fashion. I think that the most important point to notice is that the letter was issued as the culmination of an already matured and enunciated Department policy which had been developing over a period of years with respect to this particular problem of the recognition of German confiscatory and discriminatory laws, decrees and acts.

A. *Previous Governmental Actions*

The Executive Branch had participated in or issued, during the period 1943 to 1947, a number of declarations, statements, directives, and military government laws condemning the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the

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Germans on the countries or peoples subject to their control. These are referred to in paragraph 1, items (a) through (h) of the "Bernstein letter".

Two of these items might be described briefly. The first one is the Inter-Allied Declaration on Axis Acts of Dispossession which was issued in London in January, 1943 by 18 Allied countries, including the United States. The Declaration issued a warning to present and future holders of such property that the Governments involved intended to defeat the Axis dispossessions of property and reserved all rights to invalidate any transfers of such property. The Declaration reads in relevant part:

> "The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxemburg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:
>
> "Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

"Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected. . . ."

The second item is Military Government Law No. 59 on the Restitution of Identifiable Property which was issued by the U.S., U.K. and France in Germany in November, 1947. This law provided for the undoing of forced transfers and the restitution of identifiable property to persons wrongfully deprived of such property within the period from 1933 to 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Restitution was to take place, in general, despite the existence of purchasers in good faith.

B. *Return of Vested Property by Office of Alien Property*

The general problem involved in the Bernstein cases first arose for the Department in 1945 in the context of the work of the OAP, which had been seizing German assets. The

Germans had, of course, either under the purported authority of their confiscatory or discriminatory laws, or without the benefit of such laws, seized large amounts of property from peoples subject to their control, and particularly from persons of the Jewish faith. The questions thus arose as to whether the OAP should retain such property as against the original owners on the basis that the property had, through seizure by the German Government, become "German". In addition, there was the question of returning property seized by the OAP which belonged to "technical" enemies, that is, persons who were located in areas conquered by the Germans. Thus, in a letter (Tab B) of June 29, 1945 to Congressman Sumners, Chairman of the House Committee on the Judiciary, signed jointly by the Acting Secretary of State (Grew), the Attorney General (Biddle), and the Alien Property Custodian (Markham), legislation was proposed to permit the return of such property. This letter stated:

"The President, or such officer or agency as he may designate, would be required, before making any return of property, to determine that the claimant had owned the property immediately prior to vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question whether any property claimed had been transferred to enemy ownership under duress. If such were the case the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting."

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Congressman Sumners on July 10, 1948 introduced a bill, H.R. 3750, reflecting the views of the Administration. Hearing were held on the bill and then a new bill was introduced, H.R. 4571, on December 4, 1951, in substitution of H.R. 3751, and containing certain changes not pertinent here. This bill was enacted into law March 8, 1946 (P.L. 322, 79th Cong., 2d Sess., C. 83) as an amendment to Section 32 of the Trading with the Enemy Act. Section 32(a)(1), which is pertinent here, reads as follows:

> "SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine —
>
> "(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and . . ."

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In the House and Senate Reports on the bill appears this statement (H. Rept. 1269, 79th Cong., 1st Sess., p. 4; S. Rept. 920, 79th Cong., 2d Sess., pp. 3-4):

> "In construing who was the 'owner' immediately prior to vesting, acts of enemy governments which sought to divest nonenemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the 'owner' for purposes of this statute."

In addition, the OAP requested a statement of policy by the Department of State with respect to Section 32(a)(1) and a letter (Tab C) was transmitted to the Alien Property Custodian (Markham) by the Under Secretary of State (Acheson) on March 15, 1946 confirming the construction of Section 32(a)(1) reflected in the Congressional Reports.

It should be pointed out that this construction of Section 32 covered property which had been in Germany at the time of confiscation and had later come to the United States, as well as property which had been in the U.S. at the time of the confiscation.

C. *Bernstein I case.*

Subsequent to this development the first *Bernstein* case was decided by the Court of Appeals for the Second Circuit.

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Bernstein was the sole owner of several shipping companies, the Arnold Bernstein Line and the Red Star Line. He was of the Jewish faith and had come to the U.S. from Germany in the early 1930's, at which time he had applied for naturalization. He was not, however, naturalized until 1940. In 1937, prior to his American naturalization, he revisited Germany on business. While in Germany he was taken forcibly into custody by persons described in his first suit as "Nazi officials" on various charges of violating certain German foreign exchange laws and imprisoned in Hamburg until July, 1939. These "Nazi officials" allegedly compelled him under duress to execute documents purporting to transfer the stock of his various companies to one Marcus Boeger, whom Bernstein described in his first suit as a "Nazi designee". Boeger took possession of the two companies' assets, including the vessels S.S. "Gandia", the S.S. "Penland", and the S.S. "Westernland". Boeger subsequently transferred the "Gandia" to Van Heyghen Freres, a Belgian scrap concern, and the "Penland" and "Westerland" to the Holland-America Line, a Dutch concern. Both purchasers allegedly had full knowledge of the duress to which the plaintiff had been subjected.

The first Bernstein case concerned his suit against Van Heyghen Freres, the purchaser of the "Gandia". Defendant paid approximately $90,000 for the vessel and shortly thereafter had it insured for about $350,000. The vessel passed on time charter to the British Minister of War Transport, was sunk during the war, and about $400,000 was paid over as insurance proceeds to another Belgian corporation acting as defendant's agent in England. This agent also did business in New York where the plaintiff in 1946

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served upon it in a state court proceeding an attachment of the insurance proceeds as a debt owing the defendant. In his complaint the plaintiff sought damages for conversion and detention of the vessel, or, alternately, recovery of the vessel's insurance proceeds and earnings while in the defendant's possession, as money had and received by the defendant for plaintiff's use.

The federal district court in New York, to which the case was removed on defendant's application, vacated the attachment and dismissed the complaint on the theory that the extortion was by "the German Government under the Nazi regime", that the defendant, accordingly, held as transferee of a foreign sovereign, and that, as the confiscation was within German territory, it was "not subject to review in our courts" and the court, therefore, would not review defendant's title. In other words, the court refused to question the legality of the German Government's confiscation on the basis of the "Act of State" doctrine.

The Court of Appeals for the Second Circuit, in a two to one opinion by Judge Learned Hand, affirmed the District Court decision, the majority holding that the plaintiff's allegation as to "Nazi officials" and description of Boeger as a "Nazi designee" conclusively connoted the alleged duress as official and the appropriation of plaintiff's assets by Boeger as a governmental "confiscation", and hence bound the court, in the absence of explicit action by the Executive removing this restraint, to follow the established judicial doctrine that a court will not pass upon the validity of the acts of officials

of another state. *Bernstein v. Van Heyghen Freres Societe Anonyme,* 163 F.2d 246 (2d Cir. 1947) (*Bernstein I*) The Court said:

> ". . . We have repeatedly declared for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. We have held that this was a necessary corollary of decisions of the Supreme Court, and if we have been mistaken, the Supreme Court must correct it.
>
> "Thus the case is cleared for the second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply. . . .
>
> "This the plaintiff acknowledges as generally true, but he says that it presupposes that the state of the forum has not acted to relieve its courts of restraint upon the exercise of their jurisdiction; and that our own government has already so acted. This is the remaining and the critical issue in the case; and we have to examine what those actions have been. . . .

> ". . . the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary. . . .

The Court, after an examination of relevant actions by the Executive, including the various declarations and Military Government laws and orders applicable to occupied Germany, held that the Executive Branch had not in fact taken such explicit action.

Judge Clark, dissenting, argued that the actions of the Executive Branch as regards this type of situation were in fact sufficient to lift the restraint of the "Act of State" doctrine as applied to this case. He said:

> ". . . if the policy of our Executive is one of non-recognition of Nazi oppression and of restitution to the Jews I think we are bound to observe it in our courts. And all the indications I have seen so far tend to support a finding that such is the policy of the United States. Indeed, without a clear showing to the contrary, I should think the classic excoriation of the Nazi leaders for these very acts, among others, made by the American prosecutor at Nuremberg, must be accepted by us as the authentic voice of our Executive." (at p. 255).

A petition to the Supreme Court for a writ of certiorari was denied (332 U.S. 772).

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D. *Recognition of Certain Debt Claims by the Office of Alien Property*

Following the decision in *Bernstein I,* the problem of Nazi confiscation came to the Department once more in the context of the work of the OAP, but now with respect to certain debt claims. It appeared that there were on file with the OAP a number of debt claims asserted under Section 34 of the Trading with the Enemy Act, as amended, seeking payment of deposit accounts out of the vested assets of the German banks of deposit. Those accounts had been turned over by the banks to the German Government pursuant to confiscatory decree directed against Jews. These decrees provided that the banks were discharged of their obligations to the depositors. The claimants before the OAP were the successors in interest of the former owners of the accounts.

Section 34(a) of the Trading with the Enemy Act provides that: "Any defense to the payment of such [debt] claims which would have been available to the debtor shall be available to the [Alien Property] Custodian." Under this provision, if the German decrees were to be considered to have effected a valid transfer of the accounts to the German Government and a discharge of the banks' obligations to their depositors, they constituted a defense available to the banks and hence payment of the claims should be opposed by the OAP.

Faced with this situation, and with *Bernstein I* in mind, Mr. Schlesinger, Chief of the Claims Branch of OAP, sent a letter of October 12, 1948 to Mr. Gross, the Legal Adviser, in which he stated that he would "appreciate any information you can give me as to the policy of the United States in this

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regard so that this Office can most effectively assist in the implementation thereof". (Tab D)

A letter of reply of December 9, 1948 (Tab E) (cleared by L – Mr. Tate) was sent to Mr. Schlesinger by Mr. Surrey, Assistant Legal Adviser for Economic Affairs. The letter stated that the U.S. Government had consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, citing references, and went on as follows:

> "Accordingly, the Department of State is of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and sets insofar as they may be concerned in the consideration of claims filed against vested German assets. The Department, therefore, recommends that these laws, decrees, and acts should not be used as a defense by your office to any claims filed against such assets.
>
> "In reaching this conclusion, the Department has considered the cases cited in your letter, and in particular the *Bernstein* case. In the *Bernstein* case, the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy. The problem raised by your inquiry is concerned with the establishment of an executive policy with

respect to defenses which may be presented against claims under section 34(a) of the Trading with the Enemy Act.

In the event that the Office of Alien Property adopts the policy proposed, this Department would have no objection to a public release announcing such policy, but would appreciate an opportunity of reviewing such release in advance of publication. Should the OAP desire to consider further the adoption of the proposed policy, the appropriate personnel of the Department will be available for discussion of the problem."

E. *Bernstein II case*

The next development in this matter was the handing down by the Court of Appeals for the Second Circuit of its decision in the first phase of *Bernstein II.*

In addition to his suit against Van Heyghen Freres, Bernstein had also brought suit for conversion and other relief against the N.V. Nederlandsche-Amerkaansche Stoomvart-Maatsachappij (the Holland-America Line), which had purchased the assets of his Red Star Line, including the S.S. "Penland" and S.S. "Westernland", from Boeger, the "Nazi assignee". The complaint in this suit included causes of action for the recovery of insurance moneys paid to Holland-America in connection with the loss of one of the vessels and for the recovery of the proceeds of the sale of the other.

After his failure in the Van Heyghen suit (*Bernstein I*), Bernstein amended his complaint in the Holland-America suit to omit his former allegations of duress by Nazi officials and attempted to set forth duress in very general terms and without revealing the source. The District Court, among other actions, dismissed this amended complaint (76 F. Supp. 335, 79 F. Supp. 38). The dismissal of the amended complaint, among other questions*, was considered by the U.S. Court of Appeals for the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.,* 173 F.2d 71 (2d Cir. 1949). In its opinion in that case, the court held (at pp. 75-76) that because of its decision in the *Van Heyghen* case and Bernstein's former flat allegations that the duress was caused by Nazi officials, any amendment must contain an allegation that the duress was not caused by the action of such officials and in addition should specify with reasonable detail the persons by whom, and the manner in which, the duress was exercised, which the amended complaint did not. However, the court held that under certain circumstances, Bernstein could file a further amended complaint alleging duress in accordance with the above requirements, and remanded the case to the District Court.

After losing the first phase of *Bernstein II*, Mr. Bennet, of Bennet, House & Couts, attorneys for Bernstein, came to the Department in person and asked if the Department had

* There were also questions concerning the applicability of the New York Statute of Limitations to the action, the right of Bernstein to intervene as a party-plaintiff in his capacity as temporary New York receiver of the Red Star Line, and a third party complaint by the defendant against the Chemical Bank & Trust Company as warrantor.

any views to express in this particular matter. This was, of course, at a time when we had already come quite a long way in connection with this problem. After internal discussion, it was decided to write a letter to Bernstein's attorneys, which would meet the problem raised by the court in *Bernstein I* by stating that:

> "The policy of the Executive, with respect to claims asserted in the U.S. for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of the Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

Such a letter was sent on April 13, 1949 (Tab A). Copies were sent to the attorneys for Holland-America Line and to New York Federal District Court Judge Ryan. The letter was also published as Press Release 296 of April 27, 1949 and in 20 Department of State Bulletin 592 (1949).

Following the issuance by the State Department of its Press Release 296 on April 27, 1949, releasing the text of the Bennet, House & Couts letter of April 13, 1949, Bernstein filed with the Second Circuit a petition to amend the mandate it had handed down in its prior decision at 173 F.2d 71 (*Bernstein II,* 1st phase).

In *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.,* 210 F.2d 375 (2d Cir. 1954) (*Bernstein II,* 2nd phase), the

Court granted this petition. After citing and quoting in part the State Department's letter, the court said:

> "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on the acts of officials in Germany during the period in question. See 173 F.2d at pages 75-76. This will permit the district court to accept the Release in question in evidence and conduct the trial of this case without regard to the restraint we previously placed upon it." (at p. 376)

It was reported in the New York Times sometime later that the *Bernstein* case was settled on terms considered favorable by the Bernstein lawyers. In any event, no further decisions on this matter were handed down.

Appendix 11 — Letter from David L. Bazelon, Director, Office of Alien Property, and Assistant Attorney General, Department of Justice, to Seymour J. Rubin, Esq., Mar. 3, 1949 (copy on file in court papers of Judge Charles E. Clark, Yale University Library, Manuscripts and Archives, Group No. 1344, Box 45, Folder 182)

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D.C.

Mar 4, 1949

Seymour J. Rubin, Esq.
Attorney at Law
1822 Jefferson Place, N.W.
Washington 6, D.C.

Dear Mr. Rubin:

This is with reference to your letter of December 15, 1948, concerning the question whether this Office should utilize German discriminatory decrees as a defense to debt claims asserted under section 34 of the Trading With the Enemy Act, as amended. The Department of State has advised this Office that the Government of the United States has consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, and in this connection it referred to the Inter-Allied Declaration on Axis Acts of Dispossession of January 4, 1943; the Gold Declaration of February 22, 1944; Law No. 1 of the Allied Control Council; Military Government Law No. 1 (implementing certain provisions of J.C.S. 1067); and Military Government Law No. 59 dealing with Restitution of

Identifiable Property. Accordingly, the Department of State was of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Office of Alien Property, therefore, will not assert as a defense to debt claims filed under Section 34, decrees, laws and regulations of the former government of Germany, enacted or promulgated during the period between January 30, 1933 and May 8, 1945, which discriminated against individuals because of membership in a political, racial or religious group.

I might add that the Department of State in reaching its conclusion gave consideration to the *Bernstein* case (163 F.2d 246 (C.A.2d, 1947)), and in this connection pointed out that there the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy.

Sincerely yours,

/signed/ David L. Bazelon
David L. Bazelon
Assistant Attorney General
Director, Office of Alien Property

Appendix 12 — Secretary of State Frank B. Kellogg letter and certification of excerpt of Geneva World Economic Conference Report July 7, 1927, in [same as immediately above, except] Folder 41-124(3)

DEPARTMENT OF STATE

Washington

In reply refer to
So. 311.5154 L 49/ –

July 7, 1927.

The Honorable

The Attorney General.

Sir:

I have the honor to refer to your letter of July 7, 1927, regarding the action which has been instituted in the District Court of the United States for the Southern District of New York against Deutches Kalisyndikat Gesellschaft et al, on the ground that the operations of the defendants are in violation of the Sherman Anti-Trust Act and the anti-trust provisions of the Wilson Tariff Act.

I am pleased to inform you that the records of the Department do not disclose that Jean Le Cornec, Pierre Gide, Réné Gide, or Walter B. Howe are members of the diplomatic or consular service of the French Government in the United States. The Société Commerciale des Potasses d'Alsace, to which you refer, does not of course have any diplomatic or consular status in this Country.

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I would state, however, that the Department, on April 12, 1927, received from the French Ambassador, a note bearing that date, with respect to the service of a subpoena on April 7, 1927, in the Southern District Court of New York on Mr. Jean Le Cornec, Director General of the Société Commerciale des Potasses d'Alsace, and others, and urging that this Department bring to the attention of the Department of Justice the representations of the French Ambassador set forth in his note. A copy of the Ambassador's note was sent to you with this Department's letter of April 12, 1927, which was acknowledged by you on April 20, 1927.

I had previously been informed by your Department that the proceedings, in connection with which the above mentioned note of the French Ambassador was addressed to me, were brought by your Department to enjoin alleged violations of the Sherman Act and the anti-trust provisions of the Wilson Tariff Act, in connection with the importation and distribution of potash in this Country, and that it had been urged in that suit that sovereign immunity should extend to the defendants on the ground that they are acting as representatives of the French Government in the commercial undertaking referred to.

With respect to your inquiry concerning the views of this Department regarding the matter, I have to inform you that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions.

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I have the honor to be, Sir,

Your obedient servant,

Frank B. Kellogg.

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UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

Washington, D.C., July 7, 1927.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are a true copy of the original letter, which is on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

s/, [illegible]
Assistant to the *Attorney General.*

Appendix 13 — The Dorotheum Catalogues

DOROTHEUM

SEIT 1707

Klassische Moderne und
Zeitgenössische Kunst
Mittwoch, 27. November 2002, Palais Dorotheum

Appendix 13

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